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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-5275

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DEBRA JEANENE BRACEWELL,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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DEBRA JEANENE BRACEWELL,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Alabama, respectfully requests that this Court grant the Petition for Writ of Certiorari insofar as it raises the issue concerning the preclusion of lesser included offenses, which was involved in Beck v. Alabama, 437 U.S.____, 48 U.S.L.W. 4801 (June 20, 1980), vacate the judgement below, and remand the case to the Alabama Supreme Court for further consideration in light of the Beck decision. In the alternative, respondent respectfully requests that the petition be denied insofar as it raises issues not related to Beck v. Alabama, supra, and that the remainder of the petition be granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

QUESTIONS PRESENTED

1. Should the judgement of a state appellate court be vacated and the case remanded for further consideration in light of an intervening decision of this Court when the intervening decision raises state law questions which may avoid the federal

issues entirely, and when the federal issues should not be summarily decided?

2. Is the present case, in which there was no evidentiary basis at trial for non-capital lesser included offense instructions, distinguishable from Beck v. Alabama, 437 U.S. _____, 48 U.S.L.W. 4801 (June 20, 1980)?

3. Should a petitioner for certiorari be denied as to federal issues which were not presented to or addressed by the state appellate courts below?

STATEMENT OF THE CASE

This case arose from the Circuit Court of Covington County, Alabama after the petitioner was convicted therein on a charge of robbery where the victim was intentionally killed, Code of Alabama, 1975 §13-11-2(a)(2). (Photocopies of certain relevant statutes, opinions and rules are attached to the brief of the petitioner.) The petitioner was sentenced to death by electrocution.

The appeal of this conviction and sentence resulted in an opinion by the Alabama Court of Criminal Appeals which reversed and remanded the cause for a new trial. After application for rehearing by the State of Alabama the State filed a Petition for Writ of Certiorari in the Alabama Supreme Court. This petition ultimately resulted in an opinion of that Court of May 25, 1979 which reversed the decision of the Court of Criminal Appeals with instructions to review the entire record. After considering the same the Court of Criminal Appeals of Alabama issued its second opinion on January 22, 1979 in this cause and affirmed the petitioner's conviction but remanded the case back to the Circuit Court for a new sentence hearing. (As of this time no record of said sentence hearing has been docketed in the Court of Criminal Appeals. Thus no new sentence hearing and therefor no new sentence of death has been held or ordered by the trial court.)

The petitioner filed a petition for Writ of Certiorari in the Alabama Supreme Court asking that Court to review the incomplete

decision of the Court of Criminal Appeals of January 22, 1979. That petition was denied on April 11, 1980 by the Alabama Supreme Court.

The petitioner has now filed her present Petition for Writ of Certiorari in this Honorable Court. The respondent, State of Alabama offers this brief in opposition thereto.

HOW THE FEDERAL CONSTITUTION ISSUE WAS TREATED BELOW

There is a very substantial question as to whether or not the petitioner's first issue concerning the preclusion of lesser included non-capital offenses has been raised in the Alabama Courts below. A review of the trial record and the petitioner's initial brief in the Alabama Court of Criminal Appeals reveals that this matter is touched on in regard to the trial court's refusal of defendant's requested charge number 25. However, this matter as discussed therein was only noted to the effect that the charge should not have been refused. There is no argument whatsoever on the refusal of that charge merely the raising of that issue. Certainly there is no argument to the effect that: (a) it was error to not permit the jury to consider a verdict of a lesser included offense, nor (b) that evidence would support such consideration.

Likewise, in none of the numerous briefs, petitions and argument was this matter ever raised by the petitioner, the Alabama Court of Criminal Appeals or the Alabama Supreme Court. It is raised for the first time in this petition.

REASONS WHY THE WRIT SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF BECK V. ALABAMA

1. The Intervening Decision in Beck v. Alabama, 437 U.S. ____, 48 U.S.L.W. 4801 (June 20, 1980), Makes it Proper to Vacate and Remand for Further Consideration.

The Alabama Supreme Court's decision in denying the petitioner's premature Petition for Writ of Certiorari was issued on April 11, 1980, which was six-and-a-half months before this Court's decision in Beck v. Alabama, 437 U.S.____, 48 U.S.L.W. 4801 (June 20, 1980). This Court has long recognized that the proper practice in such cases is to vacate the state appellate court judgment and remand for further consideration in light of the intervening decision of this Court. E.g., Harlin v. Missouri, 439 U.S. 459 (1979); Heller v. New York, 413 U.S. 483, 494 (1973); Berger v. California, 393 U.S. 314 (1969).

At the time the Beck case was decided, there were nine other Alabama capital punishment cases pending before this Court on petitions for writs of certiorari to the Alabama Supreme Court. The respondent, State of Alabama, sent a letter dated June 23, 1980, requesting that this Court not reverse the judgments in those nine other cases but instead remand them to the Alabama Supreme Court for further consideration in light of the Beck decision. On June 30, 1980, this Court entered orders vacating and remanding instead of reversing those nine cases. They are: Williamson v. Alabama, No. 79-5026; Wilson v. Alabama, No. 79-5301; Horsley v. Alabama, No. 79-5458; Cade v. Alabama, No. 79-5525; Baldwin v. Alabama, No. 79-5563; Thomas v. Alabama, No. 79-5709; Ritter v. Alabama, No. 79-5741; Mack v. Alabama, No. 79-5835; and Crawford v. Alabama, No. 79-6190. This Court should take the same action in the present case.

2. Reconsideration by the Alabama Supreme Court is Particularly Appropriate, because State Law Issues Raised in the Wake of the Beck Decision May be Determinative.

This Court's decision in Beck v. Alabama, supra, holding the preclusion clause of Alabama's capital punishment statute unconstitutional as it applied in that case raises a serious and difficult question of whether that clause is severable from the remainder of the statute. Severability is a state law question which should be decided by the Alabama Supreme Court. E.g., Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

If the Alabama Supreme Court decides as a matter of state law that the preclusion clause is not severable and that the entire statute is due to be invalidated, then petitioner's conviction and sentence will be invalid as a matter of state law and there will be no necessity for further inquiry into any federal constitutional issues. Accordingly, there is no present necessity for this Court to address the federal constitutional issue of whether this case is distinguishable from Beck, because that issue may

be rendered moot by the Alabama Supreme Court's decision on severability. Cf., Bellotti v. Baird, 428 U.S. 132, 147 (1976) (abstention is appropriate where answers to state law questions "might avoid in whole or part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem").

Another state law question which should be answered before the federal constitutional issues are addressed concerns what, if any, lesser included offenses are definitionally possible as a matter of state law when a defendant like petitioner is charged with the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery during which the defendant was intentionally killed. While the petitioner in Beck was also convicted of violating §13-11-2(a)(2), he was not charged with and convicted of robbery-intentional killing, but instead he was charged with and convicted of robbery-murder. The difference is that the indictment in Beck gratuitously averred that the intentional killing was done "with malice aforethought," an averment of first degree murder. See, Respondent's Brief on the Merits, Beck v. Alabama, O.T. 1979, No. 78-6621, page 3 n.2. The Alabama Supreme Court has held that while such an additional averment is not required, if the State makes the additional averment that the victim was murdered in the first degree instead of simply intentionally killed, then the State must prove murder in the first degree. E.g., Clements v. State, 370 So. 2d 723, 725 (Ala. 1979); Jacobs (John L.) v. State, 371 So. 2d 448, 449 (Ala. 1979).

Since the State in Beck gratuitously averred murder in the first degree instead of intentional killing, it was clear as a matter of state law that murder was a lesser included offense as was robbery, and the State conceded that point. Beck v. Alabama, 48 U.S.L.W. at 4802 & n. 5. But in the present case it is at best unclear whether any lesser included offenses

could exist. Here, the petitioner was tried under a multi-count indictment. Of the seven counts therein four make no allegation of malice but merely allege that the victim was intentionally killed. (Two others allege "malice" and one of the seven allege "malice aforethought.") The respondent's position is further supported by the general verdict returned by the jury (R.398). Certainly, "intentional killing" is not a lesser included offense, because no such crime is defined and punished anywhere in Alabama's statutes. "Intentional killing" exists only as a component part of element of robbery-intentional killing, a capital offense. The Alabama Supreme Court has not yet decided what lesser included offenses exist in a robbery-intentional killing capital case, because that issue never arose prior to Beck.

In the words of Bellotti v. Baird, 428 U.S. 132, 148 (1976), until the Alabama Supreme Court decides the state law issues raised in the wake of the Beck decision, "it is impossible to define precisely the constitutional question presented" in this case. The Alabama Supreme Court can decide the state law issues and thereby define precisely the federal constitutional questions presented, or perhaps even avoid altogether the necessity for federal constitutional adjudication, if this case is remanded for further consideration in light of Beck. Such a remand is especially desirable since the merits of the federal constitutional issue which may be presented by this case should not be summarily decided.

3. The Merits of the Federal Constitutional Issues Presented by this Case Should Not Be Summarily Decided.

The present case is materilaly different from the Beck case and that difference alters the federal constitutional issues sufficiently enough to require full briefing and argument before any decision on the merits. The crucial difference between this case and the Beck case is that in the present case there was no basis in the evidence at trial for any

lesser included offense instruction. The grant of certiorari in Beck was limited to the following question:

> May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?
> 48 U.S.L.W. 4801 (Emphasis added).

Because there was a conflict in the evidence about Beck's intent to kill, which is a necessary element of the capital offense but not of the lesser included non-capital offenses of robbery and felony murder, which were encompassed by the indictment in that case, the State conceded in Beck that there was a factual basis for a lesser offense verdict under state law. 48 U.S.L.W. 4802 & n. 5. The State conceded that the jury in that case would have been instructed on two lesser included offenses had it not been for the preclusion clause. Id. The present case is different.

In the present case, as a matter of state law the petitioner was either guilty of the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery during which she intentionally killed the victim, or she was guilty of nothing at all. There was no evidence placing into dispute the petitioner's intent to kill, and petitioner's confession admitting the intentional killing was admitted into evidence.

That factual distinction between the present case and Beck mandates a different holding in the two cases. Not only did this Court expressly limit its holding in Beck to cases in which there was an evidentiary basis at trial for lesser included offenses, Beck v. Alabama, supra, 48 U.S.L.W. 4801 ("We now hold that the death penalty may not be imposed under these circumstances."), but all of the precedents relied upon in that decision are similarly limited. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973) ("if the evidence would permit a jury to rationally find him guilty of the lesser offense

and acquit him of the greater"), quoted on 48 U.S.L.W. at 4803; Berra v. United States, 351 U.S. 131, 134 (1956) ("if the evidence justified it"), quoted on 48 U.S.L.W. at 4804 n. 11; Stevenson v. United States, 162 U.S. 313, 323 (1896) ("if there be any evidence fairly tending to bear upon the issue"), quoted on 48 U.S.L.W. at 4803-4804 n. 11; Jackson v. State, 337 So. 2d 1242 (Miss. 1976) (not "indiscriminately or automatically," but only when "warranted by the evidence"), summarized on 48 U.S.L.W. at 4803 n. 10.

Any extension of Beck to mandate lesser included offense instructions even when there was no evidentiary basis for them at trial would not only conflict with all those precedents but would also be contrary to the holding in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court upheld Georgia's capital punishment statute which provides that lesser included offense instructions shall be given only when there is evidence to support them. 428 U.S. at 160, 161 n. 2 (joint opinion); id., at 215-216 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.) This long line of precedents should not be overturned without full briefing and argument, and this is especially true in light of the confusion caused by a summary ruling on the merits in a past capital case. See, Roberts (Harry) v. Louisiana, 431 U.S. 633, 635 (1977) (per curiam); id., at 639 (concurring opoin of Blackmun, J., joined by White and Rehnquist, J.J.). At the very least, the conviction and sentence in this case should not be summarily reversed. If the judgment is not vacated and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision, then full briefing and argument on the merits should be ordered.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE NON-BECK ISSUES RELATED IN THE PETITION

1. These Non-Beck Issues Raised by the Petition were not Presented or Decided by the Alabama Appellate Courts.

The petitioner has raised four issues separate and apart from his one Beck related issue. Briefly, they are that the petitioner was not afforded certain rights under the juvenile Code of Alabama, the determination of a proper Miranda warning in light of the "futuristic" aspects of the warnings given, the denial of a speedy trial, and the Alabama Supreme Courts's failure to properly interpret one of its own rules. (This last issue is discussed in the following section of this brief under "Reasons Why the Entire Petition is Premature." This issue was obviously not raised prior to this petition.)

Of the three remaining non-Beck issues there is no question that the speedy trial matter has never been presented in the Alabama Appellate Courts. Neither has this due process argument concerning the "futuristic" aspects of the Miranda warning ever been raised. Judge Tyson of the Alabama Court of Criminal Appeals spoke to this matter after remandment by the Alabama Supreme Court in a dissenting opinion. However, it was never addressed in any opinion by that Court, the Alabama Supreme Court, nor in any brief filed by the petitioner either before or after the dissent by Judge Tyson. This particular argument is raised for the first time in this petition.

The question of the petitioner being afforded the full protection of any rights under the Alabama Juvenile Code is also raised for the first time in this Court. The petitioner made strong arguments in the Alabama Courts concerning the Juvenile Code's definition of a "child" as it related to her confession. However, no arguments concerning this "abject failure" to afford the petitioner her rights under the juvenile code have ever been raised before. The petitioner can not now expand a very limited, narrow issue concerning a particular code definition into a broad general argument of her rights merely because she has filed this petition.

The answer to all of these arguments is that petitioner did not raise them either at trial or in the Alabama Appellate

Courts. When a state appellate court fails to pass on a particular federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present these issues below, this Court need not decide them, Beck v. Alabama, supra, 48 U.S.L.W. at 4803 n. 8 (majority opinion), Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide them, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide them. Beck v. Alabama, supra, 48 U.S.L.W. at 4807 (dissenting opinion of Rehnquist, J., joined by White, J.); Street v. New York, 394 U.S. 567, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3).

REASONS WHY THE ENTIRE PETITION IS PREMATURE

In speaking to the last issue raised by the petitioner (as Issue 5 in the Petition) the respondent finds itself with the opportunity to argue that this entire petition is premature and therefore due to be denied.

Petitioner's Issue 5 asserts that the Alabama Supreme Court denied her due process when it failed to grant her petition filed therein. As noted above, the petition was in all probability denied (without opinion) because the sentencing process had not been completed. It must be remembered that on remand the Court of Criminal Appeals remanded (after affirming) the case back to the trial court in order for a new sentence hearing to be held. Therefore it can be said that the sentencing procedure was not complete and the petitioner's Petition for Certiorari in the Alabama Supreme Court was premature and therefore properly denied. The Code of Alabama 1975, §13-11-5, relied on by petitioner requires automatic review only after "conviction and sentence of death." (emphasis added) No such sentence has been entered.

Therefore, the respondent would further contend that since the Alabama Appellate process has not been completed then this present petition is premature and subject to being denied.

CONCLUSION

For these reasons, the petition insofar as it raises issues related to Beck v. Alabama, 437 U.S._____, 48 U.S.L.W. 4801 (June 20, 1980), should be granted, the judgment below vacated, and the case remanded to the Alabama Supreme Court for furhter consideration in light of the Beck decision. Alternatively, the petition should be denied insofar as it raises issues not related to Beck, and the remainder of the petition granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

Respectfully submitted,

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